No. 86-1542

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

H. DEAN OLSON, et al.,

Petitioners,

vs.

GLENNELL EXKANO, et al.,

Respondents.

On petition for writ of certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON FOUNDATION

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RESPONSE TO PETITIONER'S STATEMENT OF QUESTIONS PRESENTED

Governmental officials were not in this case "required to anticipate subsequent court decisions" or "required to establish authority affirmatively approving their actions." These questions were

parroted from the certiorari petition in Duffy v. Ward, No. 86-815 (U.S. Nov. 17, 1986), in an apparent attempt to bootstrap this case into consideration along with Ward. Following is more accurate formulation of the issues actually presented here (encompassing the first three questions stated in the petition):

> (1) When at least two federal courts of appeals have decided an issue, may governmental officials rely on the absence of a controlling opinion by the Supreme Court or the court of appeals of a particular circuit as negating the existence of "clearly established" law for purposes of qualified immunity?
>
> (2) When two or more federal courts of appeals and the applicable federal district court have held that a constitutional right exists, may governmental officials rely on a single conflicting opinion, then on appeal, from a different district court, as creating such uncertainty that the law is no longer "clearly established"?

The fourth question urged in the petition--dealing with the scope of immunity

in a class action context--has not been presented or decided below and should not be addressed by this Court on certiorari at an interlocutory stage.

RESPONSE TO STATEMENT OF PARTIES

Qualified immunity is not available as a defense to claims against individuals in their official capacities. See Brandon v. Holt, 469 U.S. 464 (1985); Owen v. City of Independence, 445 U.S. 622 (1980). Consequently, it is uncontested that petitioners' appeal to the Ninth Circuit, and similarly their petition to this Court, are in their personal capacities only, not in their official capacities as officials of King County.

RESPONSE TO STATEMENT OF CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to 42 U.S.C. § 1983, cited by petitioners, this case involves the

fourth and fourteenth amendments to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

U.S. Const. amend. IV.

> . . . No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

RESPONSE TO STATEMENT OF THE CASE

As relevant to the present petition,[1] plaintiffs' claims arise from

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[1]Two named plaintiffs also have claims arising from being booked into the jail and detained even though they had sufficient cash to pay the established bail amounts. Plaintiffs' claims are based in part on the federal Civil Rights Act, 42 U.S.C. § 1983. Other claims are based on the Washington state constitution and common law.

defendants' acknowledged policy and practice in 1983 of indiscriminately conducting routine strip searches of all persons booked into the King County Jail in Seattle, including persons such as plaintiffs who were arrested on minor traffic or misdemeanor charges.[2] The strip search claims are brought on behalf of a class consisting of those persons arrested, booked into the jail and strip searched from May 20 to November 15, 1983, on charges other than burglary or offenses involving violence, use of a deadly weapon or drugs, without any reason to believe that weapons, criminal evidence or other contraband might be concealed. (Amended Complaint ¶ 4.1, at 17.)

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[2]Defendants have expressly admitted that during the relevant time it was their official policy and practice to conduct strip searches of every person arrested and booked into the King County Jail.

Although no written order was signed at the time of the preliminary injunction hearing in the earlier Grew litigation referred to by petitioners, the district court's oral ruling specifically advised petitioners:

(1) "[O]n the merits . . . a routine strip search is an unreasonable search in contravention to the Fourth Amendment to the United States Constitution";

(2) "The standard . . . would not be probable cause, which is a higher standard, but a reasonable suspicion that a strip search is necessary";

(3) "The decision to conduct a strip search should be made by a jail official, concurred in by a jail supervisor with articulated reasons for the search"; and

(4) "I am going to issue a preliminary injunction against routine strip searches in Clallam County and King County . . . . [T]here is a very high likelihood that the plaintiffs on this injunction issue would prevail on the merits, and applying the other standards that I must with respect to the issuance

> of a preliminary injunction, I feel that one must issue."

Transcript of Oral Opinion, Grew v. King County, No. C83-157V (W.D. Wash. May 20, 1983) (Petitioners' Appendix C, at C-2, C-4 & C-5). In plain terms, petitioners were directed to stop conducting indiscriminate booking strip searches without individualized reasonable suspicion. However, petitioners did not stop. It is undisputed that their prior policy of conducting routine strip searches of all persons booked into the King County Jail remained in effect until November 15, 1983.

Since the case was originally filed in state court in Washington and removed to federal court by defendants pursuant to 28 U.S.C. § 1441, the district court's jurisdiction over all claims is derivative, not original as stated by petitioners.[3]

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[3]Other portions of petitioners' statement of the case are also inaccurate, but will not be addressed here.

ARGUMENT OPPOSING GRANT OF CERTIORARI

Review by writ of certiorari is granted only when there are "special and important reasons" to do so. Sup. Ct. R. 17.1. Petitioners have failed to demonstrate that this case meets any of this Court's criteria for granting of certiorari. Apparently conceding that there is no split of authority among the federal circuits and that the Ninth Circuit's ruling in this case does not conflict on a federal question with any state court of last resort,[4] petitioners

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[4]The only other federal appeals court case cited by petitioners as addressing the issue of qualified immunity for indiscriminate booking strip searches of minor offense arrestees, Jones v. Edwards, 770 F.2d 739 (8th Cir. 1985), is consistent with the decision here. Jones held that qualified immunity was not available because fourth amendment protection against routine booking strip searches was "well-established" by 1981. 770 F.2d at 742 n.4. Another case which petitioners cite as inconsistent, Security and Law Enforcement Employees, District Council 82 v. Carey, 737 F.2d 187 (2d Cir. 1984), did not involve minor offense arrestees at all, but rather

urge instead that the decision below is inconsistent with the law of qualified immunity as articulated by this Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982); Davis v. Scherer, 468 U.S. 183 (1984); and Mitchell v. Forsyth, 472 U.S. 511 (1985).

While couched in terms of a critique of the court of appeals' analysis in Ward v. County of San Diego, 791 F.2d 1329 (9th Cir. 1986), petition for cert. filed sub nom. Duffy v. Ward, No. 86-815 (U.S. Nov. 17, 1986), and Capoeman v. Reed, 754 F.2d 1512 (9th Cir. 1985), petitioners' arguments are at heart addressed to the application of that analysis to the facts

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strip searches (during 1977-79) of guards specifically suspected of smuggling drugs and other contraband into prison facilities. Cf. Kirkpatrick v. City of Los Angeles, 803 F.2d 485 (9th Cir. 1986) (strip searches of police officers accused of theft).

There is similarly no conflict of authority among the circuits on the underlying issue of whether strip searches of minor offense arrestees require at least reasonable suspicion.

of this case. The legal standard applied by the courts below was proper and in accordance with applicable decisions of this Court:[5] a determination, based on the law existing at the time, of whether the right alleged to have been violated was clearly established. Since the only issue of general significance beyond the parties to this case--the legal standard--was correctly decided, it would therefore be improvident to grant certiorari simply to review the lower courts' application of that standard to particular facts.[6]

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[5]Under Sup. Ct. R. 17.1, "[t]he mere assertion of conflict with Supreme Court precedent will not suffice. Rule 17 requires that the application of the precedent to the case at bar be clear, and that the . . . federal court of appeals, did not follow that precedent." 13 J. Moore, H. Bendix & B. Ringle, Moore's Federal Practice ¶ 817.45, at SC17-47 (2d ed. 1985).

[6]Cf. Harlan, Manning the Dikes, 13 Record N.Y.C.B.A. 541, 551 (1958) ("The cornerstone of a

Moreover, the standards were properly applied because the specific rights at issue were well-established. Even if this Court were to grant certiorari in Ward and conclude that the unconstitutionality of indiscriminate booking strip searches had not been "clearly established" by 1981, and indeed even if this Court disagreed with the court of appeals' statement of the law in Ward, the decision in this case should nevertheless be allowed to stand because by 1983 there was a substantial and growing body of case law holding booking strip searches to be unconstitutional when conducted on minor offense arrestees without at least some reasonable suspicion justification.[7]

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petition for certiorari in a federal case is a showing that the question to be reviewed is one of general importance." (emphasis in original)).

[7]In addition, in Ward the defendant had been a party to a state court lawsuit in which the

The final issue on which petitioners seek review pertains only to whether there might be some unnamed individual member within the proposed plaintiff class as to which qualified immunity might be applicable. Since no class has been certified by the district court and no such individuals have been identified in the record, this issue is entirely premature.

1. It Was Well-Established by May 1983 That Indiscriminate Booking Strip Searches of Minor Offenders Were Unconstitutional.

Although the Ninth Circuit's cited only one case--Ward v. County of San Diego--in its summary affirmance order, that does not establish that the court considered nothing else in reaching its

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strip search policy had arguably been adjudicated and found to be constitutional. See Petition for Writ of Certiorari at 10-11, Duffy v. Ward, No. 86-815 (U.S. Nov. 17, 1986). In the present case, the county officials have no such defense. Indeed, their strip search policy had been the subject of a federal court suit and ruled to be unconstitutional.

decision. The court of appeals must be assumed to have fully considered the case law authority existing at the relevant time, as discussed in respondents' briefing submitted to that court.

At the time relevant to the Ward case (May 1981), a federal appellate court decision had already established that indiscriminate booking strip searches of minor offender arrestees was unconstitutional. The Seventh Circuit had concluded that, absent "any relation to the likelihood of . . . concealment of weapons or contraband," routine strip searches of traffic offenders was unconstitutionally prohibited. Tinetti v. Wittke, 620 F.2d 160 (7th Cir. 1980), aff'g 479 F. Supp. 486, 491 (E.D. Wis. 1979). In addition, the Second Circuit had described strip searching of pre-arraignment detainees charged with petty offenses as "insensitive, demeaning and stupid." Sala v.

County of Suffolk, 604 F.2d 207, 211 (2d Cir. 1979), vacated & remanded on other grounds, 446 U.S. 903 (1980) (for further consideration in light of Owen v. City of Independence, 445 U.S. 622 (1980)). The only contrary authority was one district court decision upholding a strip search of a woman arrested on a drunk-driving charge. Logan v. Shealy, 500 F. Supp. 502 (E.D. Va. 1980), rev'd, 660 F.2d 1007 (4th Cir. 1981), cert. denied, 455 U.S. 942 (1982).

By the time relevant to this case (mid-1983), there was even more substantial authority that indiscriminate booking strip search policies applied to persons arrested on traffic and other minor offenses were unconstitutional. The Fourth Circuit had reversed the district court's ruling in Logan and directed entry of a permanent injunction. The court held such an indiscriminate search policy was "con-

clusively unconstitutional" under the standards of Bell v. Wolfish, 441 U.S. 520 (1979), because it bore no "discernable relationship" to any possible security justification. 660 F.2d at 1013.[8]

Routine booking strip searches had also been held unconstitutional in a class action suit against the Chicago police. Does v. City of Chicago, No. 79-C-789 (N.D. Ill. Jan. 12, 1982),[9] aff'd sub

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[8]Petitioners' attempt to distinguish Logan on the ground that respondents in the present case were strip searched "preliminary to their transfer to the general jail population," Petition at 20, is without merit. By petitioners' own statements, respondents were in custody only "between three and four hours." Petition at 7. Nothing in Logan or any other case permits officials to circumvent a minor offense detainee's right to be free from unreasonable strip searches simply by unilaterally deciding to place such persons in the same cells with convicted criminals and persons awaiting trial on serious crimes such as robbery or drug dealing. See, e.g., Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984).

[9]Petitioners argue that the Chicago case is of no "precedential value" here because the trial court's decision was unpublished. However, a copy of that memorandum decision was served on petitioners on April 7, 1983 in connection with

nom. Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983). Another court had called strip searches "massive invasions of personal privacy" which "can be tolerated only in the most extraordinary of circumstances." Salinas v. Breier, 517 F. Supp. 1272, 1278 (E.D. Wis. 1981), rev'd on other grounds, 695 F.2d 1073 (7th Cir. 1982), cert. denied, 464 U.S. 835 (1983). Yet another federal court had expressly held that:

> [S]trip searches of temporary pre-arraignment detainees charged with minor offenses not normally associated with weapons or contraband are permissible under the Fourth Amendment only if there is a basis for reasonable suspicion that the particular detainee is concealing a weapon or contraband.

Hunt v. Polk County, 551 F. Supp. 339, 344-45 (S.D. Iowa 1982) (emphasis added).

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the earlier Grew litigation and was relied on by the district court in its oral ruling. (See Petitioners' Appendix at C-4.) It is therefore a matter of record that petitioners were, or should have been, aware of the Chicago decision.

The consistent import of these cases was that jail policies calling for indiscriminate strip searches of all arrestees, including minor offenders and persons arrested on traffic warrants, could not stand. In addition, of course, petitioners' own strip search policy had been expressly rejected as unconstitutional by a federal district court in the Grew litigation.[10]

Again, only a single trial court opinion (which was as-yet unpublished, was then on appeal and has since been unanimously reversed by the Ninth Circuit) was to the contrary. That case, Giles v. Ackerman, 559 F. Supp. 226 (D. Idaho

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[10]Plaintiffs have never argued--and the district court did not rule--that petitioners violated an actual injunction when they continued to enforce their indiscriminate strip search policy after the Grew oral ruling in 1983. What petitioners did do was to ignore the court's ruling and warning.

1983),[11] rev'd, 746 F.2d 614 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985), simply ignored the case law on point--the opinion did not even discuss either of the prominent cases, Tinetti or Logan--and relied instead on cases dealing with searches of convicted prisoners or persons in situations where there was probable cause to search.[12]

In contrast to Mitchell v. Forsyth, 472 U.S. 511 (1985), in which the only direct precedents at the time of the challenged action were two district court

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[11] In 1983 the Giles trial court decision was obviously not a Ninth Circuit precedent as petitioners suggest.

[12] Roscom v. City of Chicago, 570 F. Supp. 1259 (N.D. Ill. 1983), cited by petitioners, is similarly inapposite. Roscom involved a plaintiff who was strip searched the day after being arrested--after a preliminary court hearing, failure to post bail and transfer to a second jail facility. The county policy at issue in that case permitted strip searches only on a "reasonable cause" basis or on transfers to or from high-security-risk areas.

cases upholding the practice at issue as constitutional, the overwhelming authority in mid-1983 made clear that petitioners' strip search policy in this case would have to be changed. Petitioners "gambled and lost," not that an open question would be resolved in their favor, but on the objectively unreasonable hope that the Ninth Circuit or Supreme Court would completely reverse the line of developing case law.

2. The Court of Appeals Has Applied the Appropriate Legal Standards in This Case and in Ward.

This Court's "clearly established" test for determining qualified immunity "focuses on the objective legal reasonableness of an official's acts." Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (emphasis added). Neither Davis v. Scherer, 468 U.S. 183 (1984), nor Mitchell v. Forsyth, 472 U.S. 511 (1985), eliminate

the requirement that the official's actions be objectively reasonable.

The standard utilized by the Ninth Circuit for determining whether the law is "clearly established" under Harlow was entirely consistent with this Court's rulings: If there is direct, binding precedent in a decision by the Supreme Court or the circuit, then that precedent is deemed to "clearly establish" the law. If there is no such binding precedent, then a court considering a qualified immunity issue is to "look at all available decisional law including decisions of state courts, other circuits, and district courts to determine whether the right was clearly established." Ward, 791 F.2d at 1332; see also Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985).

This "survey [of] the legal landscape," see Ward, 791 F.2d at 1332, is precisely the determination of the law on

the dates in question that petitioners argue is required by Mitchell v. Forsyth, 472 U.S. 511 (1985). It is not a "subjective" or "hindsight" analysis for a court to look at the available body of case law at a given time. Nor does the mere existence of any conflicting precedent or the lack of a definitive Supreme Court decision automatically preclude a finding of clearly established rights and guarantee qualified immunity for defendants. See, e.g., Bilbrey v. Brown, 738 F.2d 1462, 1466 (9th Cir. 1984). The Ninth Circuit has made clear that "[a] reasonable person standard adheres at all times." Ward, 791 F.2d at 1332; see also Chilicky v. Schweiker, 796 F.2d 1131, 1138 (9th Cir. 1986). This is precisely the same standard mandated by this Court.

3. The Petition Does Not Support the Questions Said to Be Presented.

Petitioners assert that they were required by the courts below to "speculate" as to subsequent legal developments, see Petition at 15-16, and to "establish affirmative authority in support of their actions," see Petition at 23, to obtain qualified immunity. These assertions--patterned after the petition for certiorari in Duffy v. Ward--are simply not supported by the facts of this case.

Petitioners focus on one isolated passage from the court of appeals' Ward opinion, a reference to consideration of "the likelihood that the Supreme Court or Ninth Circuit would have reached the same result as courts that had already considered the issue" as a "factor" in determining whether a right was "clearly established" in the absence of direct binding precedent. See 791 F.2d at 1332.

Such consideration does not require clairvoyance on the part of public officials; it merely does not allow officials to ignore established case law simply because they are not directly bound. The court of appeals' reference in Ward to the Ninth Circuit's Giles v. Ackerman decision--which was subsequent to the search at issue in Ward--was not the basis of the Ward holding. The discussion of Giles was merely in the context of demonstrating that there was nothing in 1981 to suggest that the Ninth Circuit would hold otherwise than had already been made clear by decisions of other courts.

Astonishingly, petitioners also attempt to turn the district court's oral ruling against indiscriminate strip searches in Grew into a reason for not knowing that such searches were unconstitutional. There was, however, no need for them to divine the exact terms of an eventual

written injunction in order to know that their policy of conducting routine booking strip searches without any reasonable cause or suspicion was constitutionally impermissible. The trial court's language was clear: "a routine strip search is an unreasonable search in contravention to the Fourth Amendment." Petitioner's Appendix at C-4.

Similarly, petitioners never explain how they were, assertedly, "required to establish affirmative authority" in support of their position in order to be entitled to qualified immunity. Certainly neither the district court nor the Ninth Circuit (in this case or in Ward) said that petitioners were required to do so. Petitioners attempted to raise the district court Giles decision as affirmative authority, but the courts below properly rejected that case as insufficient to

negate the clear authority of existing federal appellate decisions.

4. Petitioners' Argument That the Strip Searches of Some Members of the Class May Have Been Constitutionally Permissible Was Not Properly Presented Below.

Petitioners' only motion in the district court sought immunity from all strip search claims, including those on behalf of the named plaintiffs and other members of the proposed class who were concededly arrested on traffic or other petty offenses. Petitioners complain that they have been "rendered . . . potentially liable for strip searching persons . . . concerning whom such searches have been found constitutional." See Petition at 32 (emphasis added). However, the proposed class consists only of those persons for whom the circumstances of the arrest were insufficient to constitute reasonable suspicion and the jail officials had no other specific facts to justify a strip

search. Nothing in the petition in this Court or in the record below identified any persons "arrested on charges commonly associated with contraband" or "who had been found actually attempting to smuggle contraband into the jail." See Petition at 32-33.

Petitioners have simply never sought qualified immunity specifically for searches of particular individuals, or even specific categories of persons. The courts below thus have never had occasion to address whether qualified immunity could be invoked with respect to the searches of any particular arrestees, or indeed whether any such searches may have been constitutionally permissible. These arguments should first be presented to the district court in defining the class or appropriate subclasses in connection with

the pending motion for class certification.[13] The issue certainly does not warrant interlocutory certiorari review by this Court.

CONCLUSION

Petitioners apparently hold the mistaken belief that exactly the same issue, in exactly the same circumstances, must have been previously decided, by a court whose decisions are binding precedent, before a right can be said to be "clearly established." As this Court's previous decisions make clear, the standard for qualified immunity is the reasonableness of the public official's actions, an objective test measured against the law as it existed at the time. The court of appeals and the district court both

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[13]A class certification motion was filed in the district court in February 1986 but has been stayed pending the interlocutory appeal.

applied the proper standard and determined, correctly, that petitioners did not act in an objectively reasonable manner by continuing to conduct arbitrary, indiscriminate routine booking strip searches in the face of a federal judge's direct instruction to them to stop and multiple federal appellate court decisions directly on point. One poorly-reasoned district court decision to the contrary and the mere absence of a direct Ninth Circuit or Supreme Court precedent were insufficient to make petitioners' actions reasonable.

By 1983, petitioners knew or should have known that continued indiscriminate booking strip searches, conducted regardless of the offense or circumstances, were unconstitutional. Nevertheless, they made absolutely no attempt to apply any criteria for determining when strip searches were reasonably necessary.

Respondents in this case were arrested in connection with only minor traffic charges. Petitioners do not, indeed, could not, assert there was any reasonable good faith grounds to believe any specific cause existed to search these particular individuals.

There is no "maze" to untangle. Cf. Petition at 27. Petitioners did not even attempt to conform their conduct to the law they should have known, and in fact did know, at the time. Consistent with the established law of other circuits and of this Court, the decision below denied qualified immunity. Any other result would mark a radical departure from the present law of qualified immunity and would leave public officials free to disregard constitutional rights with impunity, virtually without regard to the relevant case law, unless the specific

question at issue had been decided by the Supreme Court.

The petition for writ of certiorari should be denied.

DATED: April 23, 1987.

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